LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAY 15 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 16

THE UNITED STATES,

Petitioner,

against

CALTEX (PHILIPPINES), INC., THE SHELL COMPANY OF PHILIPPINE ISLANDS LIMITED and STANDARD-VACUUM OIL COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

LEO T. KISSAM,
Counsel for Respondent Caltex (Philippines), Inc.,
20 Pine Street,
New York 5, N. Y.

ALBERT R. CONNELLY,
Counsel for Respondents The Shell Company of Philippine Islands Limited and Standard-Vacuum Oil Company,
15 Broad Street,
New York 5, N. Y.

May 14, 1952.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Statement	2
The Facts	2
The Questions Presented	7
Summary of Argument	8
Argument	8
Point I—The Decision of the Court of Claims Rests Upon a Determination of Questions of Fact Which Should Not Be Reviewed by This Court	8
(a) Determinations of fact made by the Court of Claims are not reviewable by this Court	11
(b) The present cases are factually unique and do not present a question of general importance	12
Point II—The Court of Claims Correctly Applied to its Findings of Fact an Established and Consistently Recognized Principle of Constitutional and International Law	14
Point III—The Decision of the Court of Claims is Not in Conflict With Any Decision of This or Any Other Court	20
Conclusion	26

LIST OF AUTHORITIES CITED

PAGE

Aleutian Livestock Company, Inc. v. *United States*, 96 F. Supp. 626 (1951), *cert. denied*, 342 U. S. 875 (1951) 8, 21

Mrs. Alexander's Cotton Case, 69 U. S. 404 (1864) ... 21

American Propeller & Manufacturing Co. v. *United States*, 300 U. S. 475 (1937) 12

Baldwin, John P. v. *United States*, Rep. No. 259 from the Court of Claims to the House of Representatives, 36th Cong., 2d Sess. (1860-61) 15

Barrington (U. S.) v. *Mexico*, Commission under the Convention of July 4, 1868, V Moore's Internat. Arb. 3674 18

Bertrand (Fr.) v. *United States*, Commission under the Convention of January 15, 1880, V Moore's Internat. Arb. 3705 18

Booth & Company v. *United States*, 62 Ct. Cl. 288 (1926) 16

Bowles v. *Willingham*, 321 U. S. 503 (1944) 22

Chesapeake & Potomac Telephone Co. v. *United States*, 281 U. S. 385 (1930) 12

Chourreau (Fr.) v. *United States*, Commission under the Convention of January 15, 1880, V Moore's Internat. Arb. 3705 18

Crutchett (Gt. Br.) v. *United States*, Mixed Commission on British-American Claims, May 8, 1871, U. S. For. Rel. 1873, Vol. III 46 18

Dow v. *Johnson*, 100 U. S. 158 (1879) 15

Falbo v. *United States*, 320 U. S. 549 (1943) 22

PAGE

Grant v. *United States*, 1 Ct. Cl. 41 (1863) 15-16, 17, 21, 24
The Gray Jacket, 72 U. S. 342 (1886) 21

Hamilton v. *Kentucky Distillers Co.*, 251 U. S. 146 (1919) 22

Jardel (Fr.) v. *United States*, Commission under the Convention of January 15, 1880, V Moore's Internat. Arb. 3700 18
Jecker v. *Montgomery*, 18 How. 110 (1855) 21
Juragua Iron Co. v. *United States*, 212 U. S. 297 (1909) 20

Labrot (Fr.) v. *United States*, Commission under the Convention of January 15, 1880, V Moore's Internat. Arb. 3706 18
Lawton v. *Steele*, 152 U. S. 133 (1894) 22
Lichter v. *United States*, 334 U. S. 742 (1948) 22
Luckenbach S. S. Co. v. *United States*, 272 U. S. 533 (1926) 12

Martin (Gt. Br.) v. *United States*, Mixed Commission on British-American Claims, May 8, 1871, U. S. For. Rel. 1873, Vol. III 51 18
McDonald (Gt. Br.) v. *United States*, Mixed Commission on British-American Claims, May 8, 1871, U. S. For. Rel. 1873, Vol. III 54 18
Meade v. *United States*, 2 Ct. Cl. 224 (1866) 16
Miller v. *Horton*, 26 N. E. 100 (Mass. 1891) 16
Mitchell v. *Harmony*, 54 U. S. 115 (1852) 14-15, 21, 23, 24
Myers v. *United States*, 22 Ct. Cl. 80 (1887) 17

Omnia v. *United States*, 261 U. S. 502 (1922) 8, 21

Perrin v. *United States*, 4 Ct. Cl. 543 (1868) 7, 16
Presbyterian Church v. *United States*, 33 Ct. Cl. 339 (1898) 17

PAGE

Pugh v. *United States*, 5 Ct. Cl. 113 (1869) 16
Putegnat's Heirs (U. S.) v. *Mexico*, Commission under the Convention of July 4, 1868, V Moore's Internat. Arb. 3718 18

Royal Holland Lloyd v. *United States*, 73 Ct. Cl. 722 (1931) 16

Safeway Stores, Inc. v. *United States*, 118 Ct. Cl. 73 (1950) 6
St. Regis Paper Company v. *United States*, 110 Ct. Cl. 271 (1948), *cert. denied*, 335 U. S. 815 (1948) 22

Turner (Gt. Br.) v. *United States*, Mixed Commission on British-American Claims, May 8, 1871, U. S. For. Rel. 1873, Vol. III 55 18

United States v. *Chemical Foundation, Inc.*, 272 U. S. 1 (1926) 21
United States v. *Esnault-Pelterie*, 303 U. S. 26 (1938) 12
United States v. *Irwin*, 127 U. S. 125 (1888) 21
United States v. *Omaha Tribe of Indians*, 253 U. S. 275 (1920) 12
United States v. *Pacific Railroad*, 120 U. S. 227, 234-35 (1887) 8, 23-24
United States v. *Penn Foundry & Manufacturing Co., Inc.*, 337 U. S. 198 (1949) 12
United States v. *Pewee Coal Company*, 341 U. S. 114 (1951) 6
United States v. *Russell*, 13 Wall. 623 (U. S. 1871) 11-12

The Venus, 8 Cranch 253 (1814) 20

Walker v. *United States*, 34 Ct. Cl. 345 (1899) 17
Wiggins v. *United States*, 3 Ct. Cl. 412 (1867) .. 15, 16-17, 21, 24

TABLE OF STATUTES

	PAGE
Act of July 4, 1864, 13 Stat. 381 (1864-1865)	17
Acts promulgated in 6 Stat. at 147, 150, 151, 153, 155, 186, 188, 194, 195 (1790-1845); 14 Stat. 617 (1860-67); 16 Stat. 76 (1869)	18
Cong. Globe, 41st Cong., 3d Sess. 62-63, 97-103, 165-69, 295-304, 311-19 (1870-1871)	25
Fifth Amendment to the Constitution of the United States (U. S. Const. Amend. V)	2, 5, 6, 7, 9, 13, 24
Philippine Rehabilitation Act of April 30, 1946, 60 Stat. 128 (1946), as amended, 50 U. S. C. App. §§ 1751-1806 (1948)	24-25
Requisition of Military Materials Act of October 16, 1941, 55 Stat. 742-43 (1942), as amended, 50 U. S. C. App. §§ 721-24 (1948)	5, 6, 23
Title 28, United States Code, Sections 1255(1), 1651(a) and 2101(c)	1

MISCELLANEOUS AUTHORITIES

	PAGE
Borchard, Diplomatic Protection of Citizens Abroad (1915)	21
1 Bynkershoek, Laws of War, c. V	21
Grotius, Bk. 2, c. 14, § 7	19
II Halleck, International Law (4th ed. 1908) 70	19
Holland, The Law of War on Land (1918) 68	19
2 Hyde, International Law (2d ed. 1945) 957	19
V Hackworth, Digest of International Law (1943) 705	18
2 Nichols on Eminent Domain (3d ed. 1950) § 7.515	19
II Oppenheim, International Law (2d ed. 1912) 446	19
Spaight, War Rights on Land (1911) 510	19
Taylor, International Public Laws (1901) 556, 701	19
U. S. For. Rel. 1926, Vol. II, 332, 335	18-19
Vattel, Law of Nations, Bk. III, c. 15, § 232 (1760)	19, 24
Whiting, War Powers under the Constitution (43d ed. 1871) 17	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES, *Petitioner,* *against* CALTEX (PHILIPPINES), INC., THE SHELL COMPANY OF PHILIPPINE ISLANDS LIMITED and STANDARD-VACUUM OIL COMPANY, *Respondents.*	No. 610

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF RESPONDENTS IN OPPOSITION

Opinion Below

The opinion of the Court of Claims (R. 44)* and the Special Findings of Fact (R. 30) which are made a part of the judgment of that Court entered herein on November 16, 1951 (R. 61) are reported at 100 F. Supp. 970.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1255(1), 1651(a) and 2101(c).

*Unless otherwise indicated, the figures in parenthesis refer to pages of the printed transcript of record filed herein.

Statement

On December 31, 1941, representatives of the United States Armed Forces in the Far East (USAFFE) destroyed by demolition certain oil properties in the Philippine Islands which had belonged to the respondents and over which USAFFE had exercised complete dominion and control since December 12, 1941. The operative facts surrounding such destruction were contested in the Court of Claims by the petitioner herein, and that Court, after a lengthy trial of the issues raised, resolved the dispute to allow a recovery by the respondents under the "just compensation" provisions of the Fifth Amendment.

The instant petition in essence seeks to have this Court review the factual basis of decision of the Court of Claims. Accordingly, we deem it necessary to advert briefly to the facts as found by the Court in support of its judgment.

The Facts

On December 8, 1941, Manila Time, when the United States declared war on Japan, the respondents (hereinafter sometimes referred to as the oil companies) were the owners of sizable quantities of petroleum products and extensive terminal facilities for the storage and the distribution thereof, located in part in a section of Manila known as Pandacan (R. 30-31, 44-45). Since such terminals represented the only practical and immediate source of petroleum products in the Philippines, the United States Army had early formulated war plans under which, in the event of an emergency, it would take over complete control not only of the facilities and supplies of the oil companies but also of their operating personnel (R. 30-32, 45). Moreover, the intention of the Army, as contained in the war plans, to

take and use the properties of the oil companies in the event of war was fully known to, and acquiesced in by, the oil companies (R. 31-33, 45).

To the extent that the war plans anticipated and authorized the taking and use of the properties of the oil companies in the event of war, they were never changed by General MacArthur when he became the Commanding General of USAFFE in June of 1941, although he did order substantial revision of the basic tactical strategy as originally conceived by his predecessors for the defense of the Philippines against attack (R. 33-34).

Shortly after the outbreak of war—specifically on December 12, 1941—General MacArthur, through his Chief of Staff, issued orders to the Chief Quartermaster, USAFFE, under which the latter officer was directed to, and under which he did in fact, take control of the operation of supply and distribution of the petroleum products of the oil companies and of the facilities and operating personnel of the oil companies (R. 36, 45-46). In that regard representatives of the oil companies were advised, in a meeting called by the Army to effectuate its taking of the oil properties, that the Commanding Officer of the Quartermaster Depot, under the command of the Department Quartermaster, would be actively in charge of the properties (R. 36-37, 45-46). At the same time the Department Quartermaster told the Chief of the Real Estate Division of the Quartermaster Office that "we have taken over Pandacan, lock, stock, and barrel" (R. 37). Thereafter, the Pandacan properties of the oil companies were subject to the exclusive control of the Army (R. 36-38, 41, 48).

Although in the very early days of the war General MacArthur had issued an order directing every officer who

took property from any civilian owner to give a receipt therefor (R. 36), the oil companies were not at first given any such receipt. Upon the request of a representative of one of the oil companies, however, General MacArthur's Deputy Chief of Staff agreed that the oil companies were entitled to something in writing and stated that the Commanding Officer of the Quartermaster Depot was working on the matter and would attend to it in due course (R.38). No such writing was ever received (R. 38), although under date of December 25, 1941, the Chief Engineer, USAFFE, did address to each of the oil companies a letter, signed in his own name by command of General MacArthur, advising the oil companies that their properties had been "requisitioned by the U. S. Army" and directing that the operating personnel of the oil companies "remain on duty under the direction of the U. S. Army and obey any instructions given them by the U. S. Army". At least one of the oil companies received in addition a written receipt for its properties from the USAFFE officer placed in charge thereof after Manila was declared an Open City (R. 39, 46).

On December 31, 1941, in fulfillment of a specific military plan, the properties of the oil companies were destroyed by Army personnel acting under orders of the Chief Engineer, USAFFE, such destruction having been accomplished in order to prevent the facilities and the petroleum products remaining therein from falling into enemy hands (R. 41-42, 46).

After liberation of the Philippines in February of 1945, the Army continued to occupy the site of the Pandacan terminals. However, in response to repeated requests of the oil companies, as it finished with its use of portions of the land from time to time during 1945 and 1946 it returned

the same to the oil companies until all the land was once again in their possession (R. 41).

The oil companies have been paid by the petitioner for all stocks of petroleum products that were destroyed as a result of the demolition of the properties on December 31, 1941 (R. 46). They have also been paid for various tank cars, trucks and other items of equipment which were taken by the Army but never returned to the oil companies (R. 46). With an inconsistency, however, that simply will not bear analysis the petitioner has refused to pay the oil companies for the remaining facilities which were taken and used by the Army prior to December 31, 1941, and which were subsequently destroyed as a result of the demolition referred to above (R. 42).

Upon the basis of the foregoing facts, the respondents argued in the Court below that there had been a taking of their properties on December 12, 1941, for which, because the properties were not returned, just compensation was payable under the Fifth Amendment to the Constitution of the United States and under the Requisition of the Military Materials Act*. Additionally, the respondents argued that the destruction of their properties on December 31, 1941, was not in fact a loss incident to battle or due to the consequential ravages of war but was, on the contrary, a delib-

---

*Act of October 16, 1941, 55 Stat. 742-43 (1942), as amended, 50 U. S. C. App. §§ 721-24 (1948). Under that Act property could be requisitioned for the defense of the United States if it was first determined (i) that the use of such property was needed for the defense of the United States, (ii) that such need was immediate and impending and such as would not admit of delay or resort to any other source of supply and (iii) that all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms had been exhausted—but only upon the payment of just compensation.

erate and intentional act—a sacrifice of their properties calculated to benefit the war effort and the public generally although to the immediate and direct damage of the respondents alone. It was contended that, as is the case in all such sacrifices for the public good, equality of sacrifice is the rule dictated by justice and that, accordingly, the respondents were entitled to just compensation under the provisions of the Fifth Amendment and also under its statutory implementation.

The Court of Claims rejected the argument that there had been a taking of the properties on December 12, 1941 (R. 47-48);* and although the respondents do not agree with such ruling, a question with regard thereto is not raised by the instant petition and is not, therefore, before the Court for consideration at this time.

The Court of Claims also refused to consider the applicability of the Requisition of the Military Materials Act to the claims of the respondents for just compensation. It did, however, meet squarely the factual issue of deliberate and intentional taking as against a loss incident to battle, and a majority of the Court found itself persuaded to the

---

*Our argument was that the exclusive control over all the properties and operating personnel of the oil companies contemplated in the war plans and actually exercised after the outbreak of war necessarily constituted a compensable taking of the facilities as well as of the product—just as the taking of possession and operating control of the properties involved in *United States* v. *Pewee Coal Company*, 341 U. S. 114 (1951), was held to be a taking for the consequences of which the Government was held to be responsible. In rejecting that argument the Court of Claims placed principal reliance on *Safeway Stores, Inc.* v. *United States*, 118 Ct. Cls. 73 (1950), in which, although just compensation was held to be payable for a quantity of meat taken pursuant to certain Government "set-aside" orders, compensation was not awarded for a taking of the facilities (slaughterhouses and meat-packing equipment). Quite unlike the instant cases, however, in the *Safeway* case the facilities were returned intact to the owner, and it was not contended in the Court of Claims that compensation was payable for their taking.

former view. Judgment was accordingly entered for the respondents, with a determination of the exact amount of recovery being reserved for further proceedings under Rule 38(c) of the Rules of the Court of Claims.*

The Questions Presented

Contrary to the position taken in the petition herein (Pet. p. 2), there are really two questions presented by these lawsuits in their present posture. The first, which is one only of fact, is whether the loss sustained by the respondents was occasioned by a deliberate and intentional act of destruction (as against destruction due to the so-called incidental ravages of war, *e.g.*, by artillery or bombardment during the course of battle, in recapturing a town from the enemy, etc.). The second question, which is one of law, is whether a deliberate and intentional destruction by United States military forces, to deny its use to the enemy, of specific non-enemy property located in non-enemy territory (such property then being used and controlled by the United States military forces) is such a taking of private property for public use as is compensable under the Fifth Amendment to the Constitution of the United States.**

---

*We agree with the conclusion reached by the petitioner (Pet. pp. 2-3, fn. 2) that a judgment of the Court of Claims on the issue of liability alone is reviewable on certiorari before determination of the amount of damage sustained. Our position is, however, that the judgment of the Court of Claims herein on that issue is correct and should not be reviewed by this Court. If a review thereof is to be granted, we also agree with the petitioner that such should be concluded prior to a trial in the Court of Claims of the complex and protracted issues of fact and law involved in a determination of the amount of damage sustained by the respondents in these cases.

**The respondents concede that liability does not attach under the Fifth Amendment for property destroyed by the so-called incidental ravages of war. *Perrin* v. *United States*, 4 Ct. Cl. 543, 547-48 (1868);

Summary of Argument

The argument which follows will be directed and limited to the following propositions:

(a) the decision of the Court of Claims rests upon a determination of questions of fact which should not be reviewed by this Court;

(b) the principle of law relied on by the Court of Claims in rendering judgment for the respondents upon the facts as found by it has been consistently recognized and enforced by this Court and by the Court of Claims in an unbroken line of decisions, by the Congress, by international tribunals and commissions and by the Department of State of the United States; and

(c) the decision of the Court of Claims is not in conflict with any decision of this or any other Court.

ARGUMENT

POINT I

THE DECISION OF THE COURT OF CLAIMS RESTS UPON A DETERMINATION OF QUESTIONS OF FACT WHICH SHOULD NOT BE REVIEWED BY THIS COURT.

Although the petitioner has consistently urged herein that there was not any taking by the United States Army at any point in time, the Court of Claims has found as a fact that on December 27, 1941, the Army "requisitioned all

---

see *Omnia* v. *United States*, 261 U. S. 502, 510 (1922); *United States* v. *Pacific Railroad*, 120 U. S. 227, 234-35 (1887); *Aleutian Livestock Company, Inc.* v. *United States*, 96 F. Supp. 626 (1951), *cert. denied*, 342 U. S. 875 (1951).

remaining petroleum stocks, and all storage and handling facilities at the Pandacan terminals of the oil companies" (R. 41-42), and that such requisition "was in anticipation and for the purpose of destruction to prevent items of military value from falling into the hands of the enemy" (R. 42). Based upon that finding the majority of the Court reasoned as follows (R. 54):

> ". . . The Government does not attempt to insure its citizenry against losses due to the ravages of war inflicted by our own or enemy forces in the conduct of a campaign. But when it is determined that a specific person's property because of its nature or location is so essential to the war effort that it must be taken and put to use for the good of the nation, it is our belief that the public generally should bear the cost of acquisition. . . ."

And in concluding that the respondents were entitled to recover under the Fifth Amendment, it expressly found that (R. 55):

> ". . . the power of the Federal Government, derived from and limited by the Constitution does not extend to the deliberate destruction of an individual's property for the common cause without the payment to the owner of just compensation."

The dissenting judges clearly recognized that, at least in the first instance, the basic question involved was one of fact. Thus, the opinion of the minority states (R. 58):

> "It is written that private property may not be taken for public use without just compensation.
>
> "On the other hand it is well recognized that property destroyed in actual battle by either side does not call for compensation. . . .

> "Between the application of these two recognized principles is a twilight zone the boundaries of which are difficult to determine. *The differences are factual rather than fundamental.*" (Emphasis supplied.)

It then adverted to certain facts which it felt to be controlling (not any of which is, we submit, supported by the record in these cases) and indulged in a number of speculations* to reach the conclusion that (R. 61):

> ". . . the loss for which compensation is sought here, considered in its context of time and place, must be regarded in law *as what it was in fact*—a loss incident to battle . . .
>
> ". . .
>
> ". . . I can reach no other conclusion than that the destruction was due to battle conditions." (Emphasis supplied.)

It is, then, perfectly evident that the dissenting judges disagreed with the majority of the Court only to the extent that the latter had found as a fact that destruction of the property of the respondents was the result of a deliberate and intentional taking as against a destruction incident to battle.

---

*The petitioner has engaged in similar speculations (Pet. pp. 12-13) as to what *might* have happened to the properties of the respondents had they not been deliberately destroyed by the United States Army to deny their use to the enemy. Totally aside from the fact that the record is barren of testimony justifying the same, such speculations cannot and do not have any probative value at all with regard to a decision either on the instant petition or otherwise.

(a) *Determinations of fact made by the Court of Claims are not reviewable by this Court.*

It has long been held, and we do not know of any decision to the contrary, that questions of fact fully resolved by the Court of Claims will not be reviewed by this Court. A typical judicial expression of that established proposition is found in *United States* v. *Russell,* 13 Wall. 623 (U. S. 1871), which involved various steamboats owned by Russell that had been impressed into military service by officers of the Union forces. In an action brought in the Court of Claims to recover just compensation for such taking and use, the defendant had invoked the provisions of an act that withdrew from the jurisdiction of the Court of Claims "any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy . . . engaged in the suppression of the rebellion." The Court of Claims had found as a fact that the steamboats had not been appropriated and had held the jurisdictional statute inapplicable. In refusing to review that finding, this Court wrote as follows (p. 631):

> "Special reference is made in behalf of the appellants to that provision, and the argument is that it is decisive to show that the decree in this case is erroneous. Support to that proposition is chiefly drawn from the signification attributed to the word appropriation, and from certain remarks of this court in one of its recent decisions. Those remarks were made in respect to a claim where a military order was issued for the seizure of certain real estate for the purpose of compelling a lease of the premises, and the findings of the court show that the agreement for the lease was concluded under the pressure of that order. Apart from that it also appeared that

> the premises belonged to an insurgent in the rebel army, and the Court of Claims also found that the contract was void on that account. Applied as those remarks must be to the case then under consideration no doubt is entertained that they were correct, but they cannot be applied to the case before the court, as the conclusion to which they would tend would contradict the findings of the court below in matters of fact, which cannot be reviewed in this court."

See also *United States* v. *Omaha Tribe of Indians*, 253 U. S. 275 (1920); *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533 (1926); *Chesapeake & Potomac Telephone Co.* v. *United States*, 281 U. S. 385 (1930); *American Propeller & Manufacturing Co.* v. *United States*, 300 U. S. 475 (1937); *United States* v. *Esnault-Pelterie*, 303 U. S. 26 (1938); *United States* v. *Penn Foundry & Manufacturing Co., Inc.*, 337 U. S. 198 (1949). As was said by this Court in the *Omaha Indians* case with regard to a finding of the Court of Claims (p. 281):

> ". . . it is either a finding upon a mere question of fact, or at most a finding of mixed fact and law where the question of law is inseparable. In the latter case, as in the former, the finding, on familiar principles, is not reviewable. *Ross* v. *Day*, 232 U. S. 110, 116-117, and cases cited. . . ."

(b) *The present cases are factually unique and do not present a question of general importance.*

The principal alleged reason advanced by the petitioner (Pet. p. 6) for granting its application for certiorari is that the decision is of importance not only on the facts of these cases but also to the entire "scope of the war-time liabilities of the United States". But it is obvious from the

statement of facts contained in this brief and also in the instant petition that the Court of Claims was dealing with an essentially unique situation—one which in point of fact is only of academic public interest and of limited precedential value.* Thus, the formulation of war plans specifically relating to the properties of the oil companies, the action of the military taken pursuant to such plans under direct orders of General MacArthur, the elements of acquisition, use and exclusive control all pre-dating the ultimate destruction of the properties for denial purposes—such facts, and others to which we have earlier adverted, clearly point up how peculiar and personal only to this litigation is the decision reached herein by the Court of Claims.

We believe, of course, that that decision is entirely correct to the extent that it has found a deliberate denial taking and has held the same to be compensable under the Fifth Amendment.** However that may be, we respectfully submit that, since the instant petition seeks only a review by this Court of unique questions of fact which were properly resolved and applied by the Court of Claims, it should be in all respects denied.

---

*The petitioner has suggested (Pet. p. 6) that there are now pending in the Court of Claims a number of other cases involving the loss of property under "comparable" or "probably" the same circumstances as were here found to exist. Since counsel for the petitioner herein, as counsel for the Government in all such cases, must by now be quite familiar with their factual background, we do not believe that such an obviously make-weight argument can be seriously considered as a reason for granting the instant petition. We are not aware of the existence of any other case involving factual circumstances even remotely comparable to the circumstances of the instant cases.

**The contentions of the respondents which were argued to, but rejected by, the Court of Claims are not before this Court on the instant petition.

POINT II

THE COURT OF CLAIMS CORRECTLY APPLIED TO ITS FINDINGS OF FACT AN ESTABLISHED AND CONSISTENTLY RECOGNIZED PRINCIPLE OF CONSTITUTIONAL AND INTERNATIONAL LAW.

Having found that the losses sustained by the respondents resulted from a deliberate and intentional taking by the United States Army, the Court of Claims, in holding the same to be compensable, applied a principle of law which has been recognized and enforced since the very earliest days of our constitutional history. Such principle, briefly stated, is that for the deliberate and intentional destruction by military forces, to deny its use to the enemy, of specific non-enemy property located in non-enemy territory, just compensation must be paid.

A number of the authorities in which that principle has been reviewed and developed were discussed at length in the majority opinion of the Court below (R. 49-53). Accordingly, we deem it necessary here to set forth only a sampling of the judicial language upon which its application herein is based.

In *Mitchell* v. *Harmony*, 54 U. S. 115 (1852), Chief Justice Taney made perhaps the earliest judicial direction that just compensation be paid for property destroyed to deny its use to the enemy, stating in that regard (p. 113):

> "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for

public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner . . ."

And in *Dow* v. *Johnson,* 100 U. S. 158 (1879), Mr. Justice Field saw fit to refer to the *Mitchell* case as follows (p. 169):

> "We fully agree with the presiding justice of the Circuit Court in the doctrine that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield. We do not controvert the doctrine of Mitchell v. Harmony, reported in the 13th of Howard; on the contrary, we approve it. . . ."

The Court of Claims was early called upon to give application to the principle and did so unequivocally—first in *John P. Baldwin* v. *United States,* Rep. No. 259 from the Court of Claims to the House of Representatives, 36th Cong., 2d Sess. (1860-61), and later in *Grant* v. *United States,* 1 Ct. Cl. 41 (1863), and in *Wiggins* v. *United States,* 3 Ct. Cl. 412 (1867). Each of those cases involved a deliberate destruction of property to deny its use to the enemy, and in each a recovery of just compensation was allowed. Typical of the language used is the following quotation from the *Grant* opinion, during the course of which the Court stated (p. 50):

> "Private property must not only be taken upon urgent necessity, but for public use, in order to fix the liability of the government to make compensation. Was the destruction of this property a taking of it for public use? It is almost of equal public im-

portance that military supplies be kept from the use of the enemy, as that they minister to the support of our own armies. Writers on public law do not discriminate between property destroyed to prevent it from falling into the hands of an enemy, and property taken for the actual sustenance of our own military forces. In both cases it is treated as a taking for public use. . . ."

"We hold, in this case, that the property was destroyed by the rightful order of the commanding officer, and upon an urgent and pressing necessity, and to prevent it from falling into the hands of the public enemy and those hostile to the United States; that it was a taking for public use; and that the government is bound under the Constitution to make just compensation to the owner. The legal duty to make compensation raises an implied promise to do so; and here is found the jurisdiction of this court to entertain this proceeding."

And in the *Wiggins* case, the Court of Claims emphatically reaffirmed the rationale of the *Grant* decision, as follows (p. 422):*

"We do not see how this case can be distinguished in principle from that of *Grant* v. *The United States*, 1 C. Cls., p. 41. There the property of a citizen, in one of the Territories of the United States, was destroyed to prevent it from falling into the hands of the insurrectionary forces. Judge Wilmot reviews

*Other cases in which the *Grant* decision has been cited with approval include *Meade* v. *United States*, 2 Ct. Cl. 224, 275 (1866); *Perrin* v. *United States*, 4 Ct. Cl. 543, 547 (1868) (pointing up the distinction between a deliberate denial taking and a destruction during the course of military operations); *Pugh* v. *United States*, 5 Ct. Cl. 113, 117 (1869); *Booth & Company* v. *United States*, 62 Ct. Cl. 288, 295 (1926); *Royal Holland Lloyd & United States*, 73 Ct. Cl. 722, 733 (1931); *Miller* v. *Horton*, 26 N. E. 100, 102 (Mass. 1891—opinion by Judge, later Mr. Justice, Holmes).

> at length the grounds of the claim, and the authorities bearing upon the subject, and shows most clearly and conclusively that, whether the property be taken and appropriated by right of eminent domain, or destroyed to prevent other or greater injury to the public, the party is entitled to compensation. That this results as well from the principles of natural justice and equity as from the constitutional injunction to make compensation for private possessions devoted to public ends. We are entirely satisfied with the grounds there assumed, so far as they are applicable to the facts in this case, and can add nothing to the cogency or conclusiveness of the reasoning. Nor is it necessary to support it by further citations of authorities."

Shortly after the *Grant* decision, and while the War between the States was still in progress, the Congress enacted legislation removing from the jurisdiction of the Court of Claims claims against the United States based on acts of the Army or Navy in the suppression of the rebellion. See, *e.g.*, Act of July 4, 1864, 13 Stat. 381 (1864-1865). It is for that reason that the Court of Claims in cases subsequent to the *Grant* decision did not continue to allow compensation for a denial taking during the War between the States. *Cf. Presbyterian Church* v. *United States*, 33 Ct. Cl. 339 (1898); *Walker* v. *United States*, 34 Ct. Cl. 345 (1899).*

*The petitioner has referred to the *Presbyterian Church* and *Walker* cases as establishing a principle contrary to that followed in the *Grant* and *Wiggins* cases (Pet. p. 9). The distinction is found, of course, in the jurisdictional statutes under which the former cases were decided. Thus, in *Myers* v. *United States*, 22 Ct. Cl. 80 (1887), in which the Court of Claims held to be beyond its jurisdiction a claim for the burning of a boat to prevent its falling into Confederate hands, the Court said (p. 81):

> "However just this claim may be, the court has no power to consider it . . ."

Before the enactment of legislation empowering the Court of Claims to enter a judicially enforceable judgment against the Government, the Congress was frequently called upon to consider claims in the nature of a denial taking. The obligation to compensate under such circumstances was consistently recognized and discharged. See, *e.g.*, 6 Stat. 147, 150, 151, 153, 155, 186, 188, 194, 195 (1790-1845); 14 Stat. 617 (1866-1867); 16 Stat. 76 (1869).

International tribunals and mixed claims commissions have also considered the compensability of a denial taking and have held, in line with the foregoing authorities, that just compensation must be paid. See, *e.g.*, *Crutchett (Gt. Br.)* v. *United States*, Mixed Commission on British-American Claims, May 8, 1871, U. S. For. Rel. 1873, Vol. III 46-47; *Martin (Gt. Br.)* v. *United States, id.* at 51; *McDonald (Gt. Br.)* v. *United States, id.* at 54-55; *Turner (Gt. Br.)* v. *United States, id.* at 55; *Barrington (U. S.)* v. *Mexico*, Commission under the Convention of July 4, 1868, V Moore's Internat. Arb. at 3674; *Putegnat's Heirs (U. S.)* v. *Mexico, id.* at 3718-20 (and similar cases there collected); *Chourreau (Fr.)* v. *United States*, Commission under the Convention of January 15, 1880, *id.* at 3705; *Bertrand (Fr.)* v. *United States, id.* at 3705-06; *Labrot (Fr.)* v. *United States, id.* at 3706; *cf.* the argument for the United States in *Jardel (Fr.)* v. *United States, id.* at 3700.

An identical view was expressed by the Government of the United States in a letter dated May 22, 1929, to the League of Nations, Preparatory Committee of the Conference for the Codification of International Law. See V Hackworth, Digest of International Law (1943) at 705-06. Indeed, our Department of State had placed itself forcibly in accord with the principle when, in espousing the

claim of an American corporation against the British Government for the destruction during World War I of certain properties to deny their use to the enemy, it wrote through diplomatic channels as follows (U. S. For. Rel. 1926, Vol. II at 332, 335):

> "It will be perceived from the foregoing discussion that . . . the liability of a government to indemnify owners of property destroyed to prevent its falling into the hands of the enemy is established.
>
> "...
>
> "My Government feels that the facts of the present case are so clear and the applicable principles of law so elementary that there is occasion only for discussion of the amount of indemnity to be paid. . . ."

Further authority in support of the principle that a denial taking is compensable may be found in the teachings of the many learned text writers who have dealt with the subject. See, *e.g.*, Vattel, Law of Nations, Bk. III, c. 15, § 232 (1760); Grotius, Bk. 2, c. 14, § 7; Whiting on War Powers (43d ed. 1871) 17-18, 340; Taylor, International Public Laws (1901) 556-57, 701-04; II Halleck, International Law (4th ed. 1908) 70-71; II Oppenheim, International Law (2d ed. 1912) 446-49; Spaight, War Rights on Land (1911) 510-512; Holland, The Law of War on Land (1918) 68; 2 Hyde, International Law (2d ed. 1945) 957-58; 2 Nichols on Eminent Domain (3d ed. 1950) § 7.515.

It is, therefore, abundantly clear that in holding the respondents entitled to just compensation for the deliberate and intentional destruction of their property to deny its use to the enemy, the Court of Claims was giving correct

application to a principle of constitutional and international law which has been consistently recognized and enforced in this country.

POINT III

THE DECISION OF THE COURT OF CLAIMS IS NOT IN CONFLICT WITH ANY DECISION OF THIS OR ANY OTHER COURT.

The petitioner argues (Pet. p. 10) that "rulings denying compensation for losses suffered *in other circumstances* through destruction or seizure as the result of hostilities suggest that the decision below is incorrect".* We do not, of course, contend that there are not "other circumstances" under which the destruction of private property would be non-compensable (see *e. g., supra* at pp. 7-8, fn.). We do, however, contend that in light of the circumstances disclosed by the affirmative findings in these cases, the only possible principle of law which could have been applied is the one that was applied herein by the Court of Claims.

Only a brief discussion of the "other circumstances" referred to by the petitioner is necessary to show that the operative facts there involved (and, therefore, the rules of law there found applicable) were demonstrably different from the ones here found by the Court of Claims.

In *Juragua Iron Co.* v. *United States*, 212 U. S. 297 (1909), and also in the *The Venus*, 8 Cranch 253 (1814), the property involved was located in *enemy* territory. Compensation for its loss was denied—but under the accepted

*Consistent with the approach adopted by it in the Court of Claims, the petitioner ignores almost completely the very numerous authorities which give *direct* and uncontrovertible support to the position urged by the respondents and followed by the Court of Claims.

theory that all property located in enemy territory is enemy property. See also *The Gray Jacket*, 72 U. S. 342, 369-70 (1866); *Mrs. Alexander's Cotton Case*, 69 U. S. 404, 418-19 (1864); 1 Bynkershoek, Laws of War, c. V.* Similarly, confiscation by the United States of property belonging to the *enemy* or used in *hostile* enterprises against the United States is proper in time of war and does not subject the Government to a claim for compensation. See, *e.g.*, *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1 (1926); *Jecker* v. *Montgomery*, 18 How. 110 (1855). However, none of those situations was found to exist in the present cases—which were held to involve only the deliberate destruction of *non-enemy* property located in *non-enemy* territory being used for *loyal* purposes.

Moreover, decisions like *Omnia* v. *United States*, 261 U. S. 502 (1923), *United States* v. *Irwin*, 127 U. S. 125 (1888), and *Aleutian Livestock Company, Inc.* v. *United States*, 96 F. Supp. 626 (Ct. Cl. 1951), *cert. denied*, 342 U. S. 875 (1951), involving *consequential* damage arising out of the valid exercise of sovereign power, are manifestly foreign to these lawsuits for the obvious reason that there was nothing consequential about the damage suffered by these respondents. It was immediate damage and direct damage, intentionally inflicted upon them by premeditated Army action and for that reason compensable—as the Court

*The reference in the petition (Pet. p. 14) to Borchard, Diplomatic Protection of Citizens Abroad (1915), is to a part of the text likewise dealing with the destruction of property located in enemy territory. However, in later discussions the learned author affirms the rule that a deliberate denial taking of non-enemy property is compensable, stating (*id.* at pp. 262-64) that "the seizure [for military purposes] of private property for the public use and its loss and destruction while so employed . . . warrants an indemnity to the owner." In that regard he cites and discusses with approval, among others, the *Mitchell*, *Grant* and *Wiggins* cases referred to *supra* at pp. 14-17.

of Claims has held in line with the numerous authorities referred to under Point II above.

Additionally, the petitioner invites attention to allegedly analogous cases either decided under or involving an interpretation of various *legislative enactments* imposing emergency measures of regulation or control. See, *e.g.*, *St. Regis Paper Company* v. *United States*, 110 Ct. Cl. 271 (1948), *cert. denied*, 335 U. S. 815 (1948) (legislation allocating and controlling the use of war materials); *Bowles* v. *Willingham*, 321 U. S. 503 (1944) (price-control legislation); *Falbo* v. *United States*, 320 U. S. 549 (1943) (Selective Service Act); *Lichter* v. *United States*, 334 U. S. 742 (1948) (excess profits legislation); *Hamilton* v. *Kentucky Distillers Co.*, 251 U. S. 146 (1919) (War-Time Prohibition Act); *Lawton* v. *Steele*, 152 U. S. 133 (1894) (legislative exercise of State police power). Had the Congress enacted legislation purporting to deny to the respondents herein the right to recover for the damage deliberately inflicted upon them or had the Congress enacted legislation in any way affecting the jurisdiction of the Federal courts to hear and decide claims for just compensation of the sort here presented, the petitioner might refer to such decisions with better grace.* However, absent any such affirmative legislation, the jurisdiction of the Court of Claims (and of this Court) stands unimpaired, and the only reasonable inference to be drawn from such Congressional silence is that, in line with established constitutional principles of fairness and justice, compensation is to be paid

*As was pointed out above (*supra* at p. 17) the Congress did enact such legislation in connection with claims arising out of the War between the States, its reason being that, in accordance with principles of sovereign immunity, it rather than the Court of Claims should assume the responsibility of determining the claims to be allowed.

to the respondents upon their application to the Courts for enforcement of their claims.*

Perhaps the only judicial expression to which the petitioner can turn for even a semblance of comfort is set forth as a *dictum* in *United States* v. *Pacific Railroad*, 120 U. S. 227 (1887)—not at all "the leading case", as the petitioner so self-servingly characterizes it (Pet. p. 7). A brief discussion of that case will demonstrate conclusively its inapplicability to the situation here before the Court.

The *Pacific Railroad* controversy arose out of activities of the Union army during the War between the States and involved, among others, a claim by the Government for the cost of rebuilding for the Railroad certain bridges that had been destroyed by the enemy and by the Union forces. The Court held that, to the extent that the bridges were destroyed by Union forces, such destruction was under the circumstances involved lawful—a conclusion which followed from the ruling of this Court in *Mitchell* v. *Harmony*, *supra* at pp. 14-15. It also concluded that the claim of the Government for rebuilding could not properly be upheld. However, in the course of his opinion Mr. Justice Field discussed the question of the compensability of war damage generally and stated that "the destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences" (120 U. S. at 234).**

---

*Indeed, the Requisition of Military Materials Act (*supra* at p. 5) stands as compelling evidence of the intention of the Congress that the judicial rather than the legislative branch of the Government continue to hear and dispose of requisition claims of the sort here presented to the Court of Claims.

**By the time the action in the Court of Claims had been commenced, that Court was without jurisdiction over certain claims against the Government arising out of the War between the States. See *supra* at p. 17.

It is evident that the gratuitous *dictum* in which Mr. Justice Field indulged referred to the so-called incidental ravages of war (and not to a deliberate and intentional denial taking), so that it cannot have any possible application to the present cases, in which the Court of Claims has expressly found that the destruction did *not* result from the incidental ravages of war. Moreover, the doctrine of the *Mitchell*, *Grant* and *Wiggins* cases—that a deliberate denial taking is compensable under the Fifth Amendment—was not anywhere rejected by Mr. Justice Field. Quite to the contrary, such doctrine was *expressly approved* when the Court, in paraphrasing Vattel's Law of Nations, said that "[damages] done by the state deliberately . . . as when his standing corn or his storehouses are destroyed to prevent their being of use to the enemy . . . are to be made good to the individual, who should bear only his quota of the loss" (120 U. S. at 234).

Finally, the petitioner refers to the Philippine Rehabilitation Act, 60 Stat. 128 (1946), in a grasping attempt to establish a conflict of authority sufficient to warrant the issuance of a writ of certiorari herein (Pet. p. 13). Its argument in that regard breaks down as follows:

(a) the Act broadly provides for compensation for war losses, without regard to whether or not the circumstance of loss falls within any recognized principle of legal liability;

(b) certain of the losses covered in the Act might not otherwise have been legally compensable, *e.g.*, losses incurred by reason of enemy attack, looting, pillage, etc., compensation being allowed "as a matter of grace";

(c) therefore, since a denial taking is compensable under the Act, it is compensable "as a matter of grace".*

It is, of course, perfectly obvious that the reasoning employed by the petitioner simply does not follow. Moreover, while the respondents Standard-Vacuum and Caltex** might have obtained under the Act partial compensation in local currency for their war losses in the Philippines, the Act was never intended to limit in any way the legal liability of the United States for claims compensable without regard to its specific provisions or to require acceptance by a claimant of its limited benefits in lieu of the complete relief to which such a claimant would otherwise be entitled.

The foregoing discussion makes it abundantly clear that there is not any conflict in the decisions of this Court or of any other Court on the compensability of the losses sustained by these respondents under the circumstances found by the Court of Claims. Accordingly, the decision of the Court of Claims allowing a recovery for such losses, being in accord with every applicable authority—judicial or otherwise—does not warrant a review by this Court.

---

*The Presidential Veto Message referred to in the petition (Pet. p. 14) as supporting the proposition that a denial taking is compensable as a "matter of bounty rather than of strict legal right" is cited with complete inaccuracy. The legislative history of the vetoed bill shows that President Grant considered the destruction therein involved to have resulted solely from the so-called ravages of war (even though a majority of the Congress had found to the contrary). See, *e.g.*, Cong. Globe, 41st Cong., 3d Sess. 62-63, 97-103, 165-69, 295-304, 311-19 (1870-1871).

**The respondent Shell Philippines, a British corporation, would not qualify for benefits under the Act. See 50 U. S. C. A. App. § 1752 (Supp. 1951).

Conclusion

It is, therefore, respectfully submitted that for the foregoing reasons the petition for a writ of certiorari herein should be in all respects denied.

Respectfully submitted,

LEO T. KISSAM,
Counsel for Respondent
Caltex (Philippines), Inc.,
20 Pine Street,
New York 5, N. Y.

HENRY J. KIERNAN,
Of Counsel.

ALBERT R. CONNELLY,
Counsel for Respondents
The Shell Company of
Philippine Islands Limited
and Standard-Vacuum Oil
Company,
15 Broad Street,
New York 5, N. Y.

GEORGE S. COLLINS,
Of Counsel.

May 14, 1952.